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No. 51.
Brf. of Gordon for Appellee

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MILTON C. MITCHELL, PLAINTIFF IN ERROR,

*vs.*

THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C.

## BRIEF FOR APPELLEE.

J. HOLDSWORTH GORDON,
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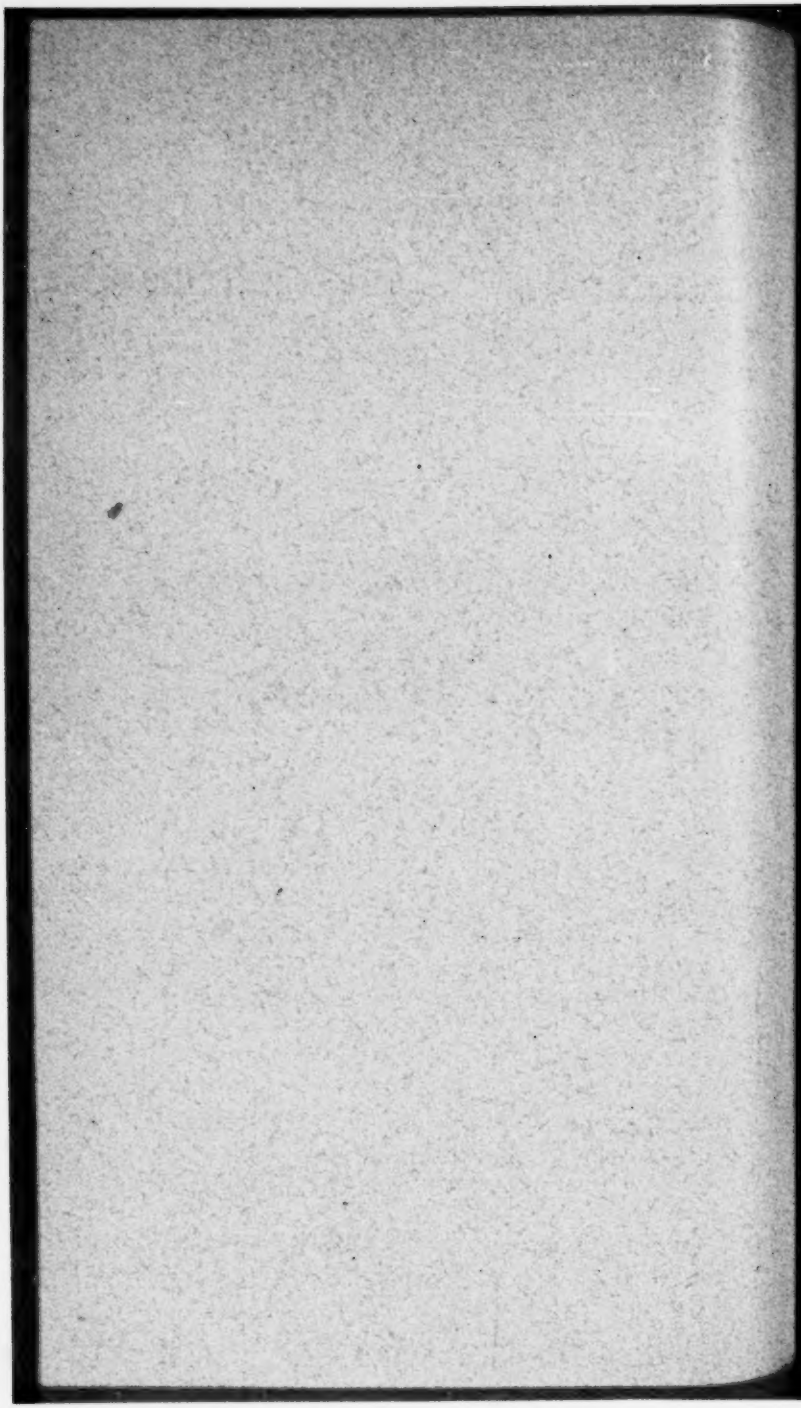

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### STATEMENT OF CASE.

On February 3, 1893, a certain policy of insurance, in due form, was issued by the Potomac Insurance Company, appellee herein, to Milton C. Mitchell, the appellant, which recited that the said company, in consideration of the sum of fifty dollars, insured from loss or damage by fire to the extent of five thousand dollars, the appellant's stock of stoves and tin findings, tins and tinware, tools of trade and such other goods kept for sale in a first-class retail stove and tin store, situate No. 3108 M street, Georgetown, D. C., with the "privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor" (Rec., p. 5). For this latter privilege an additional sum of twenty-five dollars was paid.

The policy, however, declared that said assurance against fire was made and granted subject to all the covenants and

conditions contained therein, amongst which appear the following:

> "It being covenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or *explosions of any kind* unless fire ensues, and then for the loss or damage by fire only" (Rec., p. 5).

It is further provided that if—

> "gunpowder, phosphorus, naphtha, benzine or crude earth or coal oils, etc., are kept on the premises . . . or kept for sale . . . in quantities exceeding one barrel at any one time, without written consent, or if the risk be increased by any means within the control . . . of the assured, the policy should *be void*" (Rec., pp. 5 and 6).

While said policy was still in force, to wit., On the 28th day of September, 1896, the building No. 3108 M street was demolished and the goods of the appellant almost totally destroyed. The appellant in his declaration claimed that his goods were—

> "*burnt, consumed, and destroyed by fire*, which did not happen by invasion, insurrection, riot, civil commotion, military or usurped power" (Rec., p. 2);

and claimed a loss of five thousand dollars.

To this declaration the appellee pleaded that the corporation was not indebted as alleged, and further specially denied that the goods, chattels, etc., upon the premises 3108 M street, were burnt, consumed and destroyed by fire, as alleged, claiming that the damage and loss aforesaid was the result of *an explosion, and not the result of fire*, and that the company was not liable therefor under the policy of insurance issued and sued upon.

Issue was joined on the pleas and a trial had before a jury. There was no pretense, or claim, that the goods damaged were actually burned; on the contrary, it was

conceded that the entire injuries sustained were from the crushing of the chattels by the falling building.

The evidence of the case was substantially as follows:

The principal witness for the plaintiff was Joseph A. Oliver (Rec., p. 6). From his testimony it appeared that on the day of the occurrence referred to he was in charge of the plaintiff's store, No. 3108 M street; that a customer called for a particular piece of casting; there was no one to attend to the matter but witness, and that the casting required was in the cellar of the building. The witness went down the back cellar steps. He declares (Rec., pp. 7, 8 and 9):

> "On Monday, the 28th of September, Mr. Lenz, a customer, called for a particular piece of casting. No one was in the store but myself, and the casting called for was in the cellar. I went for it down the *back cellar steps.* It was about one o'clock in the day—when I went down there was no odor of gasoline in the cellar—I know the odor, which is pungent, unmistakable and easily detected. The particular piece of casting that was wanted was in a tier of bins in the shelving on the east side of the main cellar and about fifteen feet from the back cellar. It was so far from the door that I could not see it without the use of a light. On reaching the tier I struck a match and looked in the particular place where we were accustomed to keep this kind of casting; but it was not there. As I had been away from the store for three weeks previous and did not know to what bin in the shelves they had been moved, I started looking from one to the other, *beginning near the top.* The first match burned my fingers, and I dropped it, and lit another, with which I continued *my search down, when all of a sudden the place was enveloped or filled with this blue flame.* It was a bluish color, and I knew at once it was gasoline vapor had ignited. . . . Where it started I do not know, but the first I knew of it, it was all over the place and I was in the midst of it. I don't know distinctly whether the blaze started at my hand or

not. When I became conscious of the fact that there were flames there, it was all over the place; not only where I was, but all over the cellar. *I noticed it first all over the cellar.* There was no noise connected with it except the sh-sh-sh, like the swish of a whip or anything of that kind. I could see it play around. I became unconscious, either from the burns or the walls falling on me, I don't know which. The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. . . . I did not notice any fire in the back cellar as I went into the front cellar the day of the accident."

On cross-examination it appeared that one barrel of gasoline was put into the gasoline tank on Saturday, and on Monday (the day of the accident) four more barrels were delivered at the store and put into the same tank—that there was a slight odor of vapor when the gasoline was being drawn off.

> "There is always some slight odor from it" (Rec., p. 9). "After I dropped the first match and lit a second, *all of a sudden the place was enveloped in a flame*" (Rec., p. 9). . . . *"It came all at once."* "There was no fire in the furnace at the time, and had not been since the previous winter" (Rec., p. 10).

Other witnesses for the plaintiff testified that after the destruction of the building there was—

> "a little blaze oozing out quite near the back cellar steps, and coming from beneath a pile of rubbish" (Volkman, Rec., p. 10).

One of the witnesses for plaintiff was driving past the house, and—

> "there was a flash came out of what was called a cellar door, and there was a lot of tin cans and things

> fell out into the street." . . . "There was a rumbling noise" (Fearson, Rec., p. 21).

Another heard a noise something like a bad fire-cracker, and then pfeu-pfue—that blew out the wall. The report was just loud enough to hear a block away; something on that order (Sullivan, Rec., p. 21).

Another declared there was no report:

> "The noise which attracted his attention was such a noise as the rushing of large bodies of air through a small opening would make."

He further declared that he was in the street and was stung a good deal in the face with the dust and pieces of glass and that his horse was cut in five different places, and the front of his wagon littered with glass, putty and stuff (Galloway, Rec., p. 21).

Still others testified that they heard a crash but no report (Weaver and Blackford, Rec., p. 22).

On behalf of the defendant it was shown that on numerous occasions odor of gasoline vapor had been noticed, and complaints made (Bender, Rec., p. 17, and Artz, Rec., pp. 18–19).

It was further shown by the foreman of Engine Co. No. 5, that the engine house is a little over a square from the house destroyed. That he was sitting in front of the engine house and "heard an explosion"—went to the cellar of demolished building, looked in, and—

> "saw a can on a barrel, a pint cup, and there was a little blaze coming out of it, with something in it burning. That was all the fire there was."

On cross-examination this witness testified that—

> "the noise I heard was an explosion, like a lot of powder confined—boom! It did not sound like tinware and stoves tumbling down, but like an explosion. It said 'boom,' and made me start out of my chair" (Sullivan, Rec., pp. 17–18).

The testimony of above witness as to the insignificance of the fire, was corroborated by the Assistant Fire Chief (Kurtz, Rec., p. 18).

John W. Bailey, policeman on the beat in which house destroyed was located, says: His attention was drawn to the scene by—

> "a boom that sounded like those sundown guns at a distance. I turned immediately and saw Mr. Mitchell's wall fall out on the sidewalk" (Rec., p. 19).

Joseph H. Bradley also "heard an explosion" (Rec., p. 19). This witness and Bailey also testified to conversations with Oliver in which he is alleged to have made different statements as to the number of matches used at the time of the accident.

Two experts were produced on the part of the plaintiff (Howe, Rec., p. 13, and Munroe, Rec., p. 13), who testified to the explosive character of gasoline vapor when mixed with air in the proportion of 5 per cent of vapor to 95 per cent of air; and that the vapor sinks to the floor or ground. That very little gasoline vapor would be needed to create an explosion if mingled with a large proportion of air, etc.

The witness, Munroe, defined "an explosion" as—

> "the result due to conversion of a solid or liquid into a gas, or the expansion of a gas, which is accompanied with a loud report, and the shattering of the material about it."

When asked to draw the distinction between "a quick combustion" and "a slow explosion" he answered: "It is exceedingly difficult to draw a sharp line between any systems of classification" (Rec., p. 14).

This witness (Rec., p. 15) said:

> "From the testimony, as I heard it, I am of opinion that the building was prostrated through the combustion of some body there or substance there that burned rapidly, and that as a result of this rapid

> combustion, there being, according to Mr. Oliver's testimony, but a p–sh–ing sound in the burning, by the increased pressure the floor was raised to a slight extent, and then, by the condensation, there was a pressure brought to bear upon the upper surface of the floor, and then it gave way."

The case having been submitted to the jury a verdict was rendered for the defendant, upon which judgment was entered and appeal taken.

Appeal being heard in the Court of Appeals, the judgment below was affirmed and the case is brought here asking for a reversal of that judgment.

I.

The first assignment of error is to the refusal of the court to grant the first prayer asked for the plaintiff. This prayer is found on page 22 of the Record.

There can be no doubt that the prayer offered was properly refused.

It presupposed, and is based upon that presumption, that there is evidence in the case tending to show the existence of a fire in progress in the back cellar of the building demolished, "at or before the time the witness, Oliver, went into the cellar of the plaintiff's premises." It is submitted that there was, and is, absolutely nothing in the testimony of the case to warrant such a prayer. On the contrary, the testimony offered by the plaintiff negatives such an idea.

Oliver, who alone gives us any information bearing directly on the subject, declares in response to questions from attorney for plaintiff (Rec., p. 9): "I did not notice any fire in the back cellar as I went into the front cellar, the day of the accident." And he further precludes the probability of there being such fire by removing any possible cause therefor, in that he says (Rec., p. 10):

> "There was no fire in the furnace (in the back cellar) at the time, and had not been since the pre-

vious winter. It was a warm day and I was in my shirt-sleeves."

To have submitted this prayer to the jury would have tended but to mislead them, and it would have been manifestly unjust and unfair to the defendant to have permitted the jury to make it the basis for theorizing and speculation. Nor was the plaintiff injured in the rejection of the prayer referred to. The granting of the second prayer offered by the plaintiff gave him all that he could properly ask for. In this prayer (Rec., p. 23), the court tells the jury that if they find from the evidence that the commodities of the plaintiff—

> "were destroyed, or injured, or lost, *in the manner testified to by the plaintiff's witnesses*, and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured was the immediate result thereof then the loss was occasioned by fire, within the meaning of the policy, and the plaintiff is entitled to recover in this action."

This prayer granted everything the plaintiff was entitled to, and placed his case fairly with the jury. Under it, if they could find that the commodities of the plaintiff were destroyed or injured or lost in the manner testified to by the plaintiff's witnesses, they could render a verdict for plaintiff. This laid the whole matter before them, permitting them, if they found *a fire* of any origin, or at any time, from which the damage resulted, in front cellar or in the back cellar, to assess damages for the plaintiff; so that it really embodied the very instruction asked for in the prayer rejected. As will be seen from this and the other prayers of

the plaintiff, it was, and is, conceded that the goods of the plaintiff were not injured by an actual burning, and no effort was made to bring the plaintiff's claim within the clause of the policy which provides that even in the case of fire by explosion, should loss occur as result of a subsequent fire, the loss so occurring would be covered by the terms of the policy; for, as heretofore stated, it was conceded that the losses sustained were entirely from the weight of the falling building and its debris.

And again the court in its charge (Rec., p. 27) says:

> "The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire; for the explosion would be nothing but an incident to the fire."

Here again the jury are told that if they find from the evidence a fire on the premises at any time before the explosion, if there was an explosion, they might render a verdict for the plaintiff.

It my be claimed that as a matter of fact the court had not granted a prayer of the character mentioned by him. It is submitted that even should this be so, the statement of the court in his charge, as above, that he had done so, and his reiteration of the doctrine asked for, made his course a virtual granting of the prayer.

We can not see how, under all the circumstances, the appellant can, with any degree of fairness, claim that he was injured by the action of the court in reference to the prayer rejected.

The language of the Court of Appeals (Rec., p. 39) well expresses the reason for refusal of the first prayer:

> "The instruction undertook to direct the special attention of the jury, first, to the probable existence of an accidental fire in the rear cellar before the

entry of the witness, Oliver, into the front one, and, second, to the probable ignition of the vapor in the front cellar by that fire instead of by the match lighted by Oliver immediately before the explosion, which took place in the front cellar. Neither of these inferences seemed to have any reasonable foundation in the evidence, and the second is directly opposed to the testimony of Oliver, upon which the plaintiff's case rests. Had this been the only issue in the case, the court might, without error, have directed a verdict for the defendant."

## II.

The second assignment of error is to that portion of the charge to the jury (Rec., p. 26) wherein the jury are instructed that gasoline was not one of the articles covered by the insurance, but that the privilege to keep five barrels thereof, inserted in the policy, was to offset the forfeiture of the same under its provisions, had the privilege not been granted, and was not intended as an insurance of the same. This exception should not prevail.

This charge was made to meet the claim insisted upon by plaintiff, that gasoline and its vapor were amongst the commodities insured under the policy issued by the defendant company. The ground upon which this claim was based is the language of the clause inserted into the policy as follows (Rec., p. 5): "Privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor."

A fair reading and interpretation of the policy, as a whole, clearly negatives this contention and fully justifies the charge complained of. The policy, the contract between the parties, positively provides that in the event the insured carries naptha, benzine, etc., in quantities exceeding one barrel, at any one time, without written consent of the insurer, *the policy shall be void.*

The insured wishing to sell gasoline, the commodity excluded in excess of one barrel upon penalty of voidance of

policy, secures the written consent, which reads as above. Had gasoline to the extent of five barrels been amongst the commodities *insured*, no such permit would have been necessary. As the policy stood, had the written consent not been obtained, and a fire have occurred, while more than one barrel of gasoline was on the premises, even though there had been a total loss of the insured's goods by fire, or otherwise, no recovery could have been had, for the policy, by its own terms, would have been void, absolutely. The very act of the insured in asking for the permit, shows that he recognized, and appreciated, the full force of the voiding clause of his policy. The privilege granted him, and for which he paid, was to keep the additional amount of gasoline without forfeiting his remedy in case of fire and loss. The consideration proceeding from the company, in addition to the privilege granted, was the increased risk incurred by permitting so large a quantity of gasoline to be upon the premises. If it is to become liable for an explosion caused by a preceding fire, or for the damage by fire ensuing an explosion so occurring, it can be readily seen that the presence of such a large quantity of gasoline increases immensely the probability and possibility of explosions and the consequent additional fury and destructiveness of any conflagration that might occur, fed, as it would be, by so combustible a material as gasoline. All of which risk the insurer agreed to run, for the additional premium paid. The policy declares that the mere presence of more than one barrel of gasoline will render the same void. By the new privilege granted the company assumes, therefore, a risk from which it was entirely exempt, theretofore. The privilege is a modification of the responsibility. It operates as a division and mutual distribution between the insurer and the insured of the extra risk resulting from the granting on the one part and the exercise on the other, of the privilege. Taking the original contract and the privilege together they mean simply that the company says

to the insurer, we will agree that the mere presence of more than five barrels of gasoline on the premises, or its use in your business, shall not vitiate the policy, but if it shall be the actual primary cause of any loss, we will not be held responsible. Such an arrangement was not open to legal objection, but is one the parties had full right to make, and did make. It does not cast the entire risk upon either, but divides it between them. If a fire occur from some other cause, and in consequence of the presence of gasoline, within the privileged limit upon the premises, it is aggravated, and made more destructive than it would otherwise have been, the loss falls upon the insurer. In this view of the case, which we submit is the true one, the charge of the court was most appropriate and we adopt it as part of our brief, with great confidence as to its propriety and correctness.

The contention made by appellant that gasoline was one of the commodities which he was privileged to keep and sell in his store, without special leave granted by the company, could hardly be seriously considered by the court in view of the fact that the policy itself shows that no such belief was entertained by the appellant as he applied to and received from the company the privilege to keep gasoline, paying for such privilege, thereby positively negativing the idea that he had the privilege to keep the same.

The Court of Appeals (Rec., p. 42) on this point says:

> "This privilege, given in writing, in strict accord with the printed forfeiture clause, shows conclusively that the plaintiff was informed of that clause, and believed that his policy would become void if he should keep more than one barrel of gasoline in his storehouse. Desiring to keep more than one barrel, and not more than five, he asked for the privilege, paid for it, and had it entered in writing in the body of the policy. The court was right, therefore, in telling the jury that this privilege has been inserted to avoid the forfeiture that would otherwise arise through violation of the prohibitory clause."

## III.

The third assignment of error is the refusal of the court to grant the third prayer asked for by the plaintiff (Rec., p. 23).

It will be observed that this prayer asks the court to say to the jury, that if it shall appear, from the evidence, that a liability to explode is one of the incidents of gasoline vapor under certain conditions, they must assume that the insurer, in issuing its privilege to keep the same, must have contemplated the effects fire might, or would naturally have produced on such vapor, and that therefore the plaintiff is entitled to recover if damage to plaintiff's goods were occasioned by an explosion of gasoline vapor, having its origin in fire. The object of the prayer, undoubtedly, is to say that the defendant can not claim as a defense, that an *explosion* was the cause of the injury sustained, because by the act of permitting the use of the commodities the explosion of which caused the damage, it also agreed to assume and answer for the risk of the result naturally following the contact of such commodities with fire. If this be not the object, then there can be no complaint because of the rejection of the prayer, for so far as the latter part of the prayer is concerned, wherein the court is asked to charge:

> "And if the jury further find, from the evidence, that the prostration of the building in which the insured articles were stored and the resulting damage to such articles were occasioned by an explosion of gasoline vapor having its origin in fire, the plaintiff is entitled to recover in this action,"

that was already granted in the first prayer, wherein the court says, that if a fire was in progress which originated the explosion, prostrating the building, then the damage done to plaintiff's commodities by reason of such prostration may be considered as occasioned by fire within the meaning of the policy, and recovery can be had.

Under the contract of insurance the attempt to fix

liability upon the insurer for an explosion not induced by a pre-existing fire, must fail; for by again referring to the policy (Rec., p. 6) we find that the distinct agreement between the insurer and the insured was that there should be no liability under the contract for loss caused by lightning, *or explosions of any kind unless fire ensues, and then for the loss or damage by fire only.*

As above set forth there is no claim or pretense that any injury was done to the commodities of the plaintiff from fire *ensuing* the explosion, and surely if there is anything in the contract between the parties the plaintiff is precluded from making any demand for injuries resulting from other causes than fire, unless the explosion was the direct incident to a pre-existing fire within the meaning of the policy, or fire followed, causing damage to the stock, and then only for the injuries directly resulting from such fire.

We have already, in considering the assignment of error No. 2, endeavored to show the bearing and effect of the provisions of the original policy and the privilege granted, taken together, upon the liability of the defendant company, which reasoning would apply to the present assignment with equal force.

## IV.

The fourth assignment of error is to the granting of the second, third and fourth prayers of the defendant (Rec., p. 24).

These prayers are to the effect:

(*a*) That a lighted match in the hand of, or dropped by, an employee of the plaintiff, from which an explosion is caused, resulting from ignition of vapors from oil or gases, is not to be considered "fire" in the meaning of the policy sued on.

(*b*) That if the loss was caused solely by an explosion or ignition of explosive matter, not caused by a preceding fire, the plaintiff could not recover.

(c) If an explosion occurred from contact of escaping gases with a match held by an employee of the plaintiff and the loss occurred solely from such explosion, the verdict should be for defendant.

These prayers were in accordance with the best authorities.

Heuer *vs.* Northwestern National Insurance Co. of Milwaukee, 144 Ill. 393, is a well considered case and in it the questions involved here are discussed.

By turning to the provisions of our policy it will be found (Rec., p. 6) that they are similar to those involved in the case above referred to. In that case there was an agreed statement of facts to the effect—

> "that there was an explosion in the building demolished; that the explosion was produced by the lighting of a match in the cellar of the building which was filled with illuminating gas, and that the damage was a damage by the explosion produced in this manner, but was not a damage produced by the burning of the property insured."

Now, our prayers are predicated upon the jury finding, from the evidence, that there was no fire pre-existing the lighting of the match by the witness, Oliver; that the lighting of said match ignited the escaping vapor from the gasoline in the cellar, and instantaneously produced the explosion. In the above cited case the court says (page 396):

> "It is conceded that no fire ensued from the explosion, and that the goods were not burned by fire, but were damaged by the falling of the floor, which was produced by the explosion. If, therefore, the loss was in any sense the result of fire, such fire could only have been the flame of the match, which came in contact with the illuminating gas. Is the loss to be attributed to the explosion, or to the lighting of the match, which preceded the explosion? If it is attributable to the explosion, the loss is not covered by the policy, and the company can not be held liable."

The court further says (397):

> "The exemption clause provides that 'this company shall not be liable . . . for any loss caused by . . . explosion of any kind unless fire ensues.' The use of the expression 'explosion of any kind' contemplates the existence of more than one kind of explosion. Without undertaking to make an accurate classification, we deem it sufficient to say, that one kind of explosion is that which is produced by the 'ignition and combustion of the agent of explosion,' as where a lighted match is applied to a keg of gunpowder, and another kind of explosion is that which does not involve 'ignition and combustion of the agent of explosion' as where steam or any other substance, acts by expansion without combustion. The exemption clause is broad enough to embrace both kinds of explosion. As the present case, where it appears that a lighted match was applied to the illuminating gas confined in the basement of a building, furnishes an instance of the first kind of explosion above specified, it manifestly comes within the terms of the exemption."

And the court proceeds to say (397) that—

> "It is a well-settled principle in the law of insurance that the proximate, and not the remote, cause of the loss must be regarded in order to ascertain whether the loss is covered by the policy or not."

Applying this doctrine to the present case, where the lighted match was applied to the escaped gases and an explosion thereby occurs, which causes damage, but is not followed by combustion, the explosion is the proximate cause of the injury, and the lighted match is only the remote cause. In such case, fire does not reach the property injured, but the concussion resulting from the explosion does the damage and is the proximate cause.

In our case the goods injured were not brought in contact with the fire produced by the lighting of the match, but with the explosive power of a fireless concussion, which

caused the floor and walls of the store of the plaintiff, in which the goods were located, to fall, and thereby occasioned the damage.

In Transatlantic Fire Insurance Co. *vs.* Dorsey, 56 Md. 70, the suit was on a policy containing a clause of exemption from liability for any loss that might be sustained from certain specific causes, amongst them any loss caused by the explosion of gunpowder, or any explosive substance, or explosion of any kind, unless fire ensues, and then for the loss or damage by fire only. In that case the court held that if any loss was sustained by fire that ensued the falling of the building, the company was liable, even though the fire had originated in an explosion, or where fire has pre-existed the explosion and had caused the same, the company was liable for all damages resulting, even though there was no loss by an actual burning. But the court held that it was the province of the jury to determine in such cases whether there has been an explosion, how, and by what means produced, and whether the loss sustained was directly caused by explosion, or by an antecedent fire, within the risk assumed by the insurers.

All these questions were fairly submitted to the jury, and we must assume, from their verdict, they found that there was no antecedent fire, but that the match exploded the escaping vapors, and that, as was conceded, all damages resulted from the fall of the building, and none from ensuing fire.

In Briggs *vs.* The Insurance Co., 53 N. Y. 446, the policy was upon certain machinery used for rectifying spirits. It contained a clause similar to that of the policy now sued upon. Vapors escaped from the works and came in contact with the flame of a lighted lamp in the room, and an explosion ensued which nearly destroyed the building and machinery. A fire resulted which occasioned some damage, but small in comparison with that caused by the explosion. The Court of Appeals held that the contact of the vapor in

the room with the burning lamp was not a fire within the meaning of the risk assumed, and while it was held that the company was liable for the damages done by the fire which followed the explosion, it was held not to be liable for the loss occasioned by the explosion itself.

In Insurance Co. *vs.* Foote, 22 Ohio State, 340, it was also held that a lamp causing explosion of vapors was not a "fire" within the meaning of the policy sued on.

In view of the authorities cited, and of the cases discussed therein, surely the fourth assignment of error has no standing.

V.

The fifth assignment of error is to that portion of the charge of the court in which the jury are told that the word "explosion" is to be understood in its ordinary and popular sense.

The language of the court (Rec., p. 27) was proper and in accordance with authorities. The language used is substantially that of the Court of Appeals of Maryland in 56 Md. 82 (above cited). Speaking of the word "explosion" in the policy sued on in that case, the court says (82):

> "There is often difficulty experienced in these cases, in accurately defining the term 'explosion.' . . . We must suppose that the term was employed in the policy *in its ordinary and popular meaning* and it is a question for the jury to determine, in all such cases whether there has been an explosion."

And in Heuer *vs.* Insurance Co., 22 Ohio State, 348, the court said:

> "An explosion may be described generally as a sudden and rapid combustion, causing violent expansion of air, and accompanied by a report. But the rapidity of the combustion and the violence of the report vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, *and the true meaning of the word, in each particular case, must be settled, not by any fixed standard, or*

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*accurate measurement, but by the common experience and notions of men in matters of this sort.*"

VI.

We submit that there was no error committed in the trial of the cause of which the appellant can complain, or by which his interests or rights were jeopardized. He had a full and fair hearing; he received every prayer and charge he was entitled to; he had a free field for the oratory of his counsel before the jury, and the latter decided that he had no case; and their verdict was borne out by the evidence.

In conclusion we ask attention to the language of the court in the case in 22 Ohio St. 81, 348, which applies with equal force to the present suit as it is presented in the Record:

> "The proof unquestionably shows that the origin of the fire and the explosions were simultaneous. It may be true, in a strictly scientific sense, that all explosions caused by combustion are preceded by fire. The scientist may demonstrate, in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precede explosion; but the common mind has no conception of such combustion as a fact independent of the explosion, when they concur in such rapid succession that no appreciable space of time intervenes. The terms of the policy must be taken in their ordinary sense."

And we may read in connection with the above, the statement of the witness Monroe (Rec., p. 14), when asked to draw, for the benefit of the jury, the distinction between "a quick combustion" and "a slow explosion" that "it is exceedingly difficult to draw a sharp line between any system of classification."

J. HOLDSWORTH GORDON,

*Attorney for Appellee.*